STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 7, 2009
v	No. 284307 Wayne Circuit Court
DARREL LEBRON HALL, Defendant-Appellant.	LC No. 07-013259-FH

Before: Sawyer, P.J., and Murray and Stephens, JJ.

PER CURIAM.

Defendant was found guilty by a jury of second-degree home invasion, MCL 750.110a(2), and was sentenced as a fourth habitual offender, MCL 769.12, to 114 months' to 25 years' imprisonment. He appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

In June 2007, police officers were dispatched to a vacant house in Detroit to investigate a possible breaking and entering. As the officers approached the house, they observed that a window had been broken. While searching the house, police officers discovered defendant hiding in a closet under the basement stairs. No one else was discovered in the house. There were piles of copper piping lying on the basement floor that had been removed from various areas of the home. The owner of the home testified that the pipes had not been on the floor previously.

Defendant first contends the prosecutor engaged in misconduct by making a comment in his opening statement that was not substantiated at trial. Because defendant did not object to the opening statement at trial, this issue is not properly preserved for appeal. To avoid forfeiture of an unpreserved issue on appeal, an appellant must show (1) that an error occurred, (2) that the error was plain, and (3) that the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

In his opening statement, the prosecutor remarked that a certain police officer would testify about a spigot on the outside of the house "wiggling back and forth because the copper pipe from the basement was being pulled." However, when the prosecutor began to question the officer, it became clear that the officer did not personally observe the "wiggling spigot" but

rather was told about it by his partner. Defense counsel immediately objected to the testimony on the basis of hearsay, and the objection was sustained. The prosecutor did not ask any other questions about the spigot of this officer and did not seek to have the other officer testify at trial.

If a prosecutor refers to evidence in his opening statement that is not substantiated, reversal is warranted only if the defendant was prejudiced or the prosecutor was acting in bad faith. *People v Wolverton*, 227 Mich App 72, 77; 574 NW2d 703 (1997). Clearly, the prosecution was mistaken as to which police officer observed the "wiggling spigot" and did not act in bad faith. When the court sustained defense counsel's hearsay objection, the prosecutor asked no further questions about the spigot and never referenced it in closing argument. Given that the trial was only expected to last one day, the prosecutor could have legitimately decided that the information was not worth pursuing. Furthermore, the weight of the other evidence against defendant undermines any conclusion that he was prejudiced by the prosecutor's mistaken remark. Moreover, the trial court instructed the jury that the lawyers' statements were not evidence and that it could only rely on evidence in reaching a decision. Juries are presumed to follow the instructions given to them by the court. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant also argues that the trial court erred in refusing to instruct the jury on the lesser included offense of entering without the owner's permission. A trial court's determination as to whether a jury instruction is applicable to the facts of the case is reviewed for abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

A necessarily lesser included offense is one that must be committed as part of the greater offense, making it impossible to commit the greater offense without first having committed the lesser. *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001). An instruction on a lesser included offense is only proper when the charged offense requires the jury to find a disputed fact that is not a part of the lesser included offense and when a rational view of the evidence would support the lesser included offense. *People v Smith*, 478 Mich 64, 69; 731 NW2d 411 (2007); *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). Entering without permission is a lesser included offense of second-degree home invasion. See *id.* at 360-361. The only element that distinguishes the offense of second-degree home invasion from the offense of entering without the owner's permission is the intent to commit a larceny. *Id.*

In this case, there was absolutely no evidence that defendant initially entered the home for an innocent purpose, i.e., without the intent to commit a larceny. The proofs clearly established that, once inside the home, defendant began dismantling copper pipe with the intent to steal it. Defendant's written statement to the police saying that he will continue to go into homes and steal or remove items unless he obtains help for his drug addiction suggests that he in fact intended to steal items to support his drug habit in this case. It is unlikely he would, by his own admission, generally enter homes to steal items to support his drug habit but that in *this particular case* he entered the home without such an intent. Thus, the trial court properly found that the evidence did not support the requested instruction. Because a rational view of the evidence did not support the requested instruction on the misdemeanor offense of entering

without owner's permission, the trial court did not abuse its discretion in refusing to give the instruction.

Affirmed.

/s/ David H. Sawyer
/s/ Christopher M. Murray
/s/ Cynthia Diane Stephens